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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL LEONARD ASPELL, Plaintiff and Appellant, v. RANCHO VALENCIA RESORT PARTNERS, LLC, Defendant and Respondent.	D073644 (Super. Ct. No. 37-2016-00034185-CU-WT-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Affirmed.

Aitken Campbell Heikaus Weaver, Chris M. Heikaus Weaver and Darren J. Campbell for Plaintiff and Appellant.

Gordon & Rees, Gina Haggerty Lindell and Don Willenburg for Defendant and Respondent.

Michael Leonard Aspell alleged that his former employer, Rancho Valencia Resort Partners, LLC (defendant), violated California law and public policy when it fired him based

on his age and in retaliation for complaining about defendant's use of unlicensed software. Defendant denied the allegations and argued that it terminated Aspell because of his poor performance. The trial court granted summary judgment in favor of defendant. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant operates the Rancho Valencia Resort (the resort), a world renowned facility that utilizes various data systems requiring technical support. The information technology (IT) manager position at the resort is a critical position, responsible for maintaining, improving, resolving, and securing all technology and data related operations. The IT manager is responsible for ensuring that all technical systems are in working order. This includes promptly addressing any issues as they arise, including after hours and on weekends. The position demands a high degree of leadership, proactivity, judgment, urgency, efficiency, and professionalism along with the technical skills and knowledge required of a high level IT manager.

In early February 2014 Aspell applied for the IT manager position after the prior IT manager, Jason Schlarmann, resigned. Mark Blevins, defendant's director of finance and supervisor of the IT manager, interviewed Aspell, his final candidate, for the position and hired him a few days later. Typically, Blevins interviewed only final candidates. At the time, Blevins was 40 years old and Aspell was 63.

In June 2014 Blevins gave Aspell a 90-day performance review of "very good." In January 2015[1] Aspell informed Blevins that Microsoft had requested that the resort

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1 Undesignated date references are to 2015.

perform a self-audit to ensure it did not have unlicensed software users. Blevins told Aspell, "Don't worry about the licensing, Microsoft probably will not follow up on it. Companies get these all the time. It's not essential that you do it." Concerned with the potential legal ramifications of having unlicensed software users, Aspell requested an extension of time from Microsoft to conduct the self-audit and e-mailed information to Omid Arjomand, an IT assistant defendant hired in May 2014, to aid in starting the license audit.

In March Blevins issued Aspell an overall "satisfactory" performance evaluation that thanked Aspell for his hard work and dedication, but listed some areas needing improvement. In April Aspell reported to Blevins that the resort had not purchased a sufficient number of software licenses and recommended that the resort purchase additional licenses in order to become "fully compliant." Aspell claims that Blevins told him to "hold off" until January 2016 to purchase the additional licenses. Blevins then told Aspell that he would consult with the general manager and get back to him. But Blevins never got back to Aspell. Blevins disputes that he never replied to Aspell and claims that he told Aspell to submit a purchase order, that Aspell submitted the purchase order, and that he approved the purchase.

In August someone nominated Aspell for the "Manager of the Quarter" award. On September 21 Aspell began a scheduled maintenance to replace a hard drive in the storage server. Arjomand was scheduled to come into work that night at 10:00 p.m. to assist Aspell, but he called in sick. At about 11:00 p.m. the e-mail server failed to reboot and gave an error message. Aspell worked through the night and into the next morning to

remedy the issue. Aspell got assistance from an outside consultant, an experienced IT professional, who recommended a solution. When Blevins arrived later that morning, Aspell briefed him about the server issue and informed him that he was working with a consultant to resolve it. Blevins told Aspell not to use the outside consultant because Blevins did not know him. Aspell immediately stopped working with the consultant.

On September 23 Blevins recommended Aspell's termination to Claudia Pina, the resort's director of human resources. According to Pina, Blevins complained that Aspell had not contacted Blevins's preferred consultant, Schlarmann, to help remedy the server issue and instead obtained assistance from another consultant that Blevins did not know. Blevins and Pina formalized the termination decision by completing a payroll action form and drafting a termination letter. On September 24 Blevins and Pina met with Aspell and ended his employment.

In September 2016 Aspell filed a complaint alleging age discrimination, failure to prevent discrimination, wrongful termination in violation of public policy based on both age discrimination and retaliation, and violation of Business and Professions Code section 17200. In August 2017 defendant moved for summary judgment or alternatively summary adjudication. The trial court granted summary judgment and entered a judgment in defendant's favor. Aspell timely appealed.

DISCUSSION

I. *GENERAL LEGAL PRINCIPLES*

We independently review an order granting summary judgment or adjudication, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v.*

Advanced Group 400 (2001) 25 Cal.4th 763, 768.) We first identify the issues framed by the pleadings because it is those issues the papers must address. (*Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1054.) Second, we determine if the moving party's evidence demonstrates the opponent cannot establish its claim and justifies a judgment in the moving party's favor. (*Ibid.*) Lastly, we determine whether the opposing party's evidence demonstrates a triable issue of material fact. (*Ibid.*) In determining whether there are triable issues of fact, we consider all the evidence set forth by the parties, except that to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) In performing our review, we are not bound by the trial court's stated rationale, but independently determine whether the record supports the trial court's conclusion that the plaintiff's claims failed as a matter of law. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 951.)

Aspell's first and third causes of action allege discrimination and retaliation under the California Fair Employment and Housing Act (FEHA). The FEHA prohibits an employer from discriminating against any employee on certain enumerated grounds, including age. (Gov. Code, § 12940, subd. (a).) "California courts have adopted a "three-stage burden-shifting test established by the United Stated Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment." (*Guz, supra,* 24 Cal.4th at p. 354, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*).) "This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims

must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz*, at p. 354.)

Under the *McDonnell Douglas* test, (1) the plaintiff employee must set forth sufficient evidence to establish a prima facie case of discrimination; (2) the defendant employer must then articulate a legitimate, nondiscriminatory reason for the adverse employment action; and (3) the plaintiff employee then has the opportunity to show the employer's articulated reason is pretextual. (*Guz, supra,* 24 Cal.4th at pp. 354-355; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 214-215 (*Harris*).) The *McDonnell Douglas* test also applies to FEHA retaliation claims. (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1108-1109 (*Loggins*).)

"[L]ike all other defendants, the employer who seeks to resolve the matter by summary judgment must bear the initial burden of showing the action has no merit." (*Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1058.) A defendant may meet its initial burden of proof in FEHA cases by showing that the plaintiff cannot demonstrate a prima facie case, or by setting "forth admissible evidence of its reasons, unrelated to unlawful discrimination, for the adverse employment action." (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003, citing *Guz, supra,* 24 Cal.4th at p. 357.)

" '[T]o avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory

animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' [Citation.] '[T]he employee [cannot] simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons." ' " ' " (*Nakai v. Friendship House Assn. of American Indians, Inc.* (2017) 15 Cal.App.5th 32, 39.)

"While we must liberally construe plaintiff's showing and resolve any doubts about the propriety of a summary judgment in plaintiff's favor, plaintiff's evidence remains subject to careful scrutiny." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433.) A "plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations. [Citations.] And finally, plaintiff's evidence must relate to the motivation of the decision makers to prove, by nonspeculative evidence, an actual causal link between prohibited motivation and termination." (*Id.* at pp. 433-434.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz, supra,* 24 Cal.4th at p. 361.)

II. *ASPELL'S ARGUMENTS REGARDING THE* McDONNELL DOUGLAS *TEST*

Aspell notes that "[f]or decades attorneys and courts have used the three-part, burden-shifting *McDonnell Douglas* test to analyze claims, in particular on summary judgment." He claims that in *Harris, supra*, 56 Cal.4th 203, the California Supreme Court "[e]ffectively [o]verruled" the *McDonnell Douglas* test and requests that we "clearly announce that the *McDonnell Douglas* test has no more application to motions for summary judgment in employment discrimination cases."

Asserting that every employment discrimination case involves an employment action motivated by both discriminatory and nondiscriminatory reasons; i.e., mixed-motives, Aspell contends that "the premise of the *McDonnell Douglas* test—that there is one true reason for the adverse employment action—is flawed." He claims that the sole issue on summary judgment should be whether " ' "[a protected characteristic] was a motivating factor for the defendant's adverse employment action." ' " (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1185 (*Husman*).

We reject Aspell's argument that in *Harris, supra*, 56 Cal.4th 203 our high court, sub silentio, overruled use of the *McDonnell Douglas* test in employment discrimination cases. In *Harris*, the court addressed the propriety of BAJI No. 12.26, the mixed-motive instruction.[2] *Harris* held that in a mixed-motives case, where the adverse employment

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2 BAJI No. 12.26 states: " 'If you find that the employer's action, which is the subject of plaintiff's claim, was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision. [¶] An employer may not, however, prevail in a mixed-motives case by

decision was motivated by more than one reason, only one of which was discriminatory, the applicable test for causation is whether the discriminatory motive was a "substantial factor" in the employer's decision. (*Id.* at pp. 211, 232, 241.) If the employer can prove the same adverse decision would have been made independently of the discrimination, the available remedies are limited to declaratory relief, injunctive relief and attorney fees. (*Id.* at p. 241.) Damages, backpay, and reinstatement are not available, since it would constitute a windfall to the plaintiff. (*Ibid.*)

In *Harris*, *supra*, 56 Cal.4th 203, the court cited the *McDonnell Douglas* test as the appropriate test in "FEHA employment discrimination cases that do not involve mixed motives . . . ." (*Id.*, at p. 214.) The *Harris* court explained that "the *McDonnell Douglas* inquiry aims to ferret out the 'true' reason for the employer's action. In a mixed-motives case, however, there is no single 'true' reason for the employer's action. What is the trier of fact to do when it finds that a mix of discriminatory and legitimate reasons motivated the employer's decision? That is the question we face in this case." (*Id.*, at p. 215.) In *Husman*, *supra*, 12 Cal.App.5th 1168, the court found that the *Harris* "mixed-motive analysis translates readily to the summary judgment context" (*id.* at p. 1185) explaining that even when an employee fails to establish pretext, FEHA claims are not properly resolved on summary judgment "[i]f triable issues of material fact exist whether

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offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Neither may an employer meet its burden by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The essential premise of this defense is that a legitimate reason was present, and standing alone, would have induced the employer to make the same decision.' " (*Harris*, *supra*, 56 Cal.4th at p. 213.)

discrimination was a substantial motivating reason for the employer's adverse employment action." (*Id.* at p. 1186.)

In *Harris*, *supra*, 56 Cal.4th 203 our high court did not overrule the *McDonnell Douglas* test. Rather, for cases where pretext cannot be shown because the adverse employment decision is based at least in part on a legitimate nondiscriminatory ground, a plaintiff may avoid summary judgment by offering evidence creating a triable issue of fact that a protected characteristic was a substantial factor motivating the adverse decision. (*Husman*, *supra*, 12 Cal.App.5th at p. 1186.) Such a showing would establish that the employer's articulated reason is pretextual. The three-step *McDonnell Douglas* test remains valuable in the summary judgment context because some cases will fail at the first step if the employer shows "the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled." (*Guz*, *supra*, 24 Cal.4th at p. 354.)

III. *MERITS*

A. *Age Discrimination*

The FEHA makes it an unlawful employment practice for an employer to discharge an employee over the age of 40 on the ground of age. (Gov. Code, §§ 12926, subd. (b); 12940, subd. (a).) Defendant argued that Aspell's age discrimination claim lacked merit because Aspell's "poor documented performance" was a legitimate reason for his termination. The trial court concluded, and we agree, that defendant met its initial burden of showing a legitimate, nondiscriminatory reason for Aspell's termination. For purposes of

this appeal, Aspell does not dispute that defendant had a legitimate, nondiscriminatory business reason for his termination.

Thus, the correctness of the trial court's ruling turns on whether Aspell presented " 'substantial evidence that [defendant's] stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence [defendant] acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude [defendant] engaged in intentional discrimination.' " (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806-807.) Simply showing that defendant's decision "was wrong, mistaken, or unwise" is insufficient to avoid summary judgment. (*Id.* at p. 807.) Rather, Aspell " ' "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [defendant's] proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' [citation], and hence infer 'that [defendant] did not act for the [. . . asserted] non-discriminatory reasons.' " ' " (*Ibid.*)

"[A]n inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons. The pertinent statutes do not prohibit lying, they prohibit discrimination. [Citation.] Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Guz, supra*, 24 Cal.4th at pp. 360-361.)

To show pretext, a plaintiff can use three types of evidence: "(1) direct evidence . . . such as statements or admissions, (2) comparative evidence, and (3) statistics." (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 816.)[3] Aspell produced no direct evidence of pretext, such as age-related remarks and evidence of a causal relationship between the remarks and the adverse action. (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 550.) Aspell also failed to present statistical evidence creating an inference of discrimination, such as the termination of other employees over age 40. (See *Guz, supra,* 24 Cal.4th at p. 367.)

Aspell argues that an inference of age discrimination can be drawn because: (1) his performance reviews were positive; (2) his alleged performance issues became a supposed problem only after his eventual, much-younger replacement was hired; and (3) his much-younger predecessor and replacement received more favorable treatment. As we shall discuss, Aspell's evidence is insufficient to create a triable issue of fact showing defendant's true reason for his termination was age discrimination.

1. *Aspell's performance and timing of performance related complaints*

In February 2014 defendant hired Aspell. In May 2014 defendant hired Arjormand as an IT assistant. In June 2014 Blevins completed a 90-day performance review of Aspell that consisted of a series of categories to be rated on a scale of one to five. Aspell received an

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[3] Aspell argues, defendant concedes, and we agree that the trial court erred when it stated that to establish pretext, Aspell was required to present evidence showing that defendant's reasons for his termination were false. However, we review the correctness of the trial court's ruling, not its rationale, and will affirm the judgment if it is correct on any ground presented in the trial court, regardless of the court's stated reasons. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

overall score that quantified his performance as "very good." The written portion of the evaluation provided no specific examples of laudable or poor performance; rather, it generally credited Aspell's job commitment and ability to handle challenges during his first 90 days in the position.

In October 2014 Blevins issued Aspell a performance improvement plan to reiterate expectations and provide specific examples for improvement. Some areas of concern included Aspell's failure to: (1) complete a budget in time for a scheduled appointment to review the budget and failing to communicate to Blevins before the appointment that the budget had not been completed, (2) take the "lead" to resolve "several Micros report errors" or work with the outside consultants who resolved the issue, (3) organize his office as previously requested and keeping his office in disarray because Aspell's office is noticeable to others walking past, (4) understand or learn about the resort's ResortSuite software, and (5) communicate to the management team better business practices from an IT perspective.

The plan listed the following areas where Aspell was required to "show immediate and sustained improvements": (1) proactive communication including better judgment about who to communicate with and when to do so, (2) cleaning and organizing his office by the end of the week and maintaining cleanliness indefinitely, (3) immediately training on the ResortSuite software, and (4) displaying leadership in all IT-related matters.

In March 2015 Blevins issued Aspell an overall "satisfactory" performance evaluation that thanked Aspell for his hard work and dedication, but noted some areas that needed improvement. Although Aspell displayed "adequate" judgment, Blevin noted two instances where Aspell did not use his best judgment by interrupting a meeting to retrieve a piece of

equipment and by allowing Arjormand to drink beer at a member party. Blevins indicated that Aspell "must improve" his communication across the resort, stating that he had seen instances where Aspell needed to "step in and 'take control' of a situation or perhaps send an email explaining something." Blevins again noted the importance of office and work area cleanliness.

In April Blevins noted that it took two weeks to resolve an issue regarding employee time clocks and that Aspell displayed a lack of communication by failing to respond to repeated requests for updates. In May Blevins expressed concern to Aspell that Aspell had not performed daily system backup for six days, requesting that Aspell learn HeroWare. One of the essential functions of the IT Manager is to "[e]stablish and maintain backup procedures for all systems to ensure protection from loss of data and ensure backups are carried out in accordance with company policy." In May another manager contacted Blevins "extremely upset regarding [Aspell's] lack of understanding of basic Banquet Event Orders [BEO]." The manager told Blevins that Aspell "has been here over a year, and I get the feeling that he still doesn't understand know how to read BEO's and this is why things get missed."

In June Schlarmann advised Blevins in two e-mails about concerns regarding Aspell's job performance. Schalarmann stated that Aspell was "not capable of prioritizing more important tasks over less important ones." Among other things, Schlarmann also expressed concern "with multiple malfunctioning security cameras, critical system backup issues, as well as the need to replace various key devices such as servers and other hardware." Also in June, Blevins noted a lack of communication and inaction by Aspell related to the resort's

spam filter blocking external e-mails. Blevins stated that Aspell's "ineffectiveness came to a head" in September when a crash crippled the resort's e-mail server. Blevins noted that Aspell violated protocol by failing to inform him, any member or the executive team, or the resort's IT consultant about the crash.

The evidence shows that defendant experienced performance-related issues with Aspell throughout Aspell's term of employment particularly regarding communication issues. Defendant hired Arjormand about two months after hiring Aspell. This evidence does not support a reasonable inference that hiring Arjormand led to defendant's complaints about Aspell's performance. A "general dispute concerning [plaintiff's] job performance, in the absence of any other evidence of age discrimination, does not provide a sufficient basis for a jury to infer that [the employer] terminated plaintiff on the basis of his age." (*Fallis v. Kerr-McGee Corp.* (10th Cir. 1991) 944 F.2d 743, 747.) Stated differently, even if a jury "chose to believe [Aspell's] assessment of his performance rather than [defendant's], that choice, standing alone, does not permit a conclusion that [defendant's] version was a pretext for age discrimination." (*Ibid.*)

2. *Comparative evidence*

Pretext may be proven through comparative evidence showing that the employer treated similarly situated persons in similar circumstances more favorably than it treated plaintiff. (*McDonnell Douglas*, *supra*, 411 U.S. at p. 804; *Guz*, *supra*, 24 Cal.4th at p. 366.) Aspell suggests that defendant's failure to discipline his much younger predecessor for a week-long e-mail outage shows illegal age discrimination. Specifically, Aspell noted in his declaration that by reading e-mails he learned that Schlarmann, defendant's prior IT

manager, who was 20 to 30 years younger, suffered a week-long e-mail outage without being terminated. Aspell stated: "By reviewing Schlarmann's emails, I learned that during Schlarmann's tenure there was a server crash that resulted in Defendant's email system being down for approximately *one week*." The trial court, however, sustained hearsay and lack of foundation objections to this part of Aspell's declaration. Aspell asserts that the trial court erred when it rejected this evidence, claiming the e-mails qualified as business records and an exception to the hearsay rule.

We review de novo the propriety of the hearsay objection because it presents a question of law, but review lack of foundation objections for abuse of discretion. (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226.) The trial court properly sustained defendant's hearsay objection because Aspell's out-of-court statement about the e-mails was "offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Additionally, Aspell did not lay any foundation to qualify the e-mails as business records.[4] Even if Aspell had laid such a foundation, where a statement involves multiple levels of hearsay, each level must satisfy a hearsay exception for the entire statement to be admissible. (Evid. Code, § 1201; *People v. Reed* (1996) 13 Cal.4th 217, 224-225.) Aspell's statement

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4 "Codified by [Evidence Code] section 1271, the business records exception to the hearsay rule permits admission of hearsay to prove an act, condition, or event if the following foundational requirements are met: '(a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.' [Citations.] It is the burden of the party offering the evidence to establish that these foundational requirements have been met." (*People v. McVey* (2018) 24 Cal.App.5th 405, 414.)

about what others wrote in the e-mails is double hearsay. Accordingly, the trial court properly sustained defendant's hearsay and lack of foundation objections. As such, Aspell's admissible evidence does not create a triable issue of age discrimination.[5]

Next, Aspell claims that defendant repeatedly favored Arjomand, citing several examples of such favoritism which allegedly support an inference of age discrimination. First, Aspell complains that defendant disciplined him for violating defendant's alcohol policy, but did not discipline Arjomand for violating the same alcohol policy. When hired, Aspell acknowledged his understanding of a document entitled "Alcohol and Drugs" outlining defendant's policy prohibiting alcohol consumption by employees on its premises. Aspell also acknowledged that part of defendant's policy stating: "Some management positions, due to their nature, require entertainment of guests, clients, vendors, potential business, etc. In such cases when entertainment is necessary alcoholic beverages may be consumed provided such consumption is done responsibly and with restraint." In December 2014 Belvins observed Aspell and Arjomand consuming alcohol on the premises during "a member holiday party" in violation of defendant's policy. Aspell presented no evidence

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5 The trial court sustained defendant's lack of foundation objections to portions of Aspell's declaration regarding Aspell's knowledge of Arjomand's hiring, his nomination for manager of the quarter, and Schlarmann's availability. Aspell disputes the propriety of the trial court's evidentiary ruling as to these portions of his declaration. Aspell, however, has not met his burden of showing that the exclusion of this evidence resulted in prejudice that would entitle him to a reversal of the court's summary judgment ruling. (Evid. Code, § 354; Code Civ. Proc., § 475; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1419 [" 'A trial court's exercise of discretion in . . . excluding evidence . . . will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' "].)

showing that he acted in a management position entertaining guests when he drank the alcohol. Rather, when asked at deposition whether he was working this event, Aspell stated, "No." When asked again whether he worked this event he stated: "Well, we were there, but not on the clock." Thus, Aspell presented no evidence creating a triable issue that defendant improperly disciplined him for violating the alcohol policy.

Belvins could not recall whether he recommended to Aspell that Arjomand be disciplined for drinking beer at that event, but stated that Arjomand was not his "direct report," it was up to Aspell as the department head to make a disciplinary decision, and Aspell provided no written documentation showing that Arjomand had been disciplined. At deposition, Aspell claimed that during this event Blevins was Arjomand's primary supervisor and he was Arjomand's secondary supervisor. Thus, Aspell and Belvins appear to dispute *who* should have disciplined Arjomand for drinking the beer at the event, not whether Arjomand should have been disciplined. Based on the existence of this dispute, defendant's failure to discipline Arjomand does not create a triable issue of illegal age discrimination.

Aspell complains that Blevins improperly criticized him for showing poor judgment when he interrupted a meeting to retrieve equipment necessary for a wedding. He claims that the task had been assigned to Arjomand, but that Arjomand had unexpectedly taken the day off. Blevins stated that Aspell knew the start time for the meeting and should have planned ahead. This dispute, however, does not show that defendant favored Arjomand, nor does it support a rational inference that illegal age discrimination was the true cause for defendant's criticism. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344 (*Arteaga*) [" " "employer may fire an employee for a good reason, a bad reason, a reason based on

erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason" ' "].)

Specific positive assessments of plaintiff's performance by coworkers and other managers may constitute "specific and substantial" circumstantial evidence undermining the employer's credibility and suggesting its negative assessment of the employee was pretextual. (*EEOC v. Boeing Co.* (9th Cir. 2009) 577 F.3d 1044, 1051.) Aspell contends the evidence creates a triable issue of age discrimination because in August, only a month before his termination, he had been nominated for the "Manager of the Quarter" award. Pina explained that the nominations for this award "come from the employees. So it can be peers, it could be subordinates, it could be leadership—you know, people in leadership roles overseeing that employee or even not overseeing that employee. So anybody who feels that somebody has expectational positive interactions could be nominated. So there's no restriction who can nominate or who can be nominated." The executive team ultimately decides the person selected for the award. Because the nomination for this award can come from any resort employee, Aspell's nomination does not undermine defendant's credibility or create a triable issue of pretext.

Aspell next notes that defendant allegedly terminated him based on his job performance, including one particular e-mail outage, but did not discipline Arjomand for his failure to assist in resolving the e-mail outage. Aspell admits, however, that Arjomand called in sick one hour before the start of prescheduled hardware maintenance, the e-mail problem did not arise until later that evening, and Arjomand arrived at work the following

morning. This evidence does not support a rational inference that defendant favored Arjomand because Arjomand was not working when the e-mail crisis arose.

"A triable issue as to an employer's veracity 'may arise where the employer has given shifting, contradictory, implausible, uninformed, or factually baseless justifications for its actions.' " (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 677.) Citing this authority, Aspell notes that Blevins's and Pina's declarations contradicted their deposition testimony on the issue whether Aspell resigned or was terminated. Specifically, Pina testified at deposition that she had prepared the paperwork to terminate Aspell's employment, but at the meeting with Aspell regarding his termination she claims Aspell "blurted out" that he would resign. Blevins disputed that Aspell had been terminated, but admitted that he recommended to Pina the day before that Aspell be terminated. During his deposition Aspell disagreed that he had resigned. He stated that he asked Blevins, "What do you want me to do? Resign?" After this, he claimed that Pina took out the termination paperwork, which he then signed. This purported dispute as to *how* Aspell ended his employment with defendant does not create a triable issue of fact showing that defendant's reason for *why* it ended Aspell's employment—his poor job performance—was pretextual.

Aspell also notes that both Blevins and Pina stated in their declarations that defendant terminated him based on his "poor performance" and "insubordination," but his termination letter did not mention insubordination and both individuals previously testified that he was not terminated for insubordination. This difference does not support a reasonable inference of age discrimination, nor is it sufficient to raise a triable issue regarding defendant's credibility. Defendant's termination letter cited Aspell's "performance, judgment, lacking

proactive communication *and more*" (italics added) as the reasons for his termination, and defendant consistently cited Aspell's job performance as the reason for his termination.

Finally, Aspell claims that a jury could infer illegal age discrimination based on defendant's later promotion of Arjomand, who was less-qualified, to the IT Manager position. Although replacing Aspell with a younger and less qualified individual can support a prima facie case of age discrimination (*Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 142), to survive summary judgment Aspell "cannot simply rest on the prima facie showing, but must adduce substantial additional evidence from which a trier of fact could infer the articulated reasons for the adverse employment action were untrue or pretextual." (*Loggins, supra*, 151 Cal.App.4th at p. 1113.) Blevins explained that Arjomand assumed Aspell's job duties "based purely on his experience and knowledge of the role and the urgency with which [the resort] needed someone as opposed to taking the time to search, interview, and train someone new." Without more, Arjomand's assumption of the IT manager position does not support Aspell's claim that illegal age discrimination motivated defendant to terminate his employment.

Here, considering defendant's innocent explanation for its action, Aspell's evidence, as a whole, is insufficient for a reasonable jury to conclude that defendant's nondiscriminatory reason was pretextual or that Aspell's age was a substantial motivation factor for his termination. (*Guz, supra*, 24 Cal.4th at p. 362.)

B. *Wrongful Termination: Retaliation*

Aspell alleged that defendant wrongly terminated his employment in retaliation for his protected complaints regarding defendant's use of illegal software in violation of Labor

Code[6] section 1102.5. Defendant sought summary judgment of Aspell's retaliation claim on the ground Aspell's termination was unrelated to any alleged protected activity and Aspell could not show that he actually engaged in a protected activity. The trial court found no triable issue of fact showing a nexus between Aspell's termination and his protected activity. Aspell contends that the trial court erred because the evidence he presented shows that his complaints regarding defendant's use of unlicensed software contributed to his termination. Defendant disagrees, claiming that the licensing issue Aspell raised was not a problem and the evidence shows that Aspell's negative performance evaluations came before he raised the licensing issue.

An employer is prohibited from retaliating "against an employee for disclosing information . . . to a person with authority over the employee . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (§ 1102.5, subd. (b).) Contrary to Aspell's contention in his opening brief, retaliation claims are also analyzed under the burden-shifting framework of the *McDonnell Douglas* test. (*Arteaga, supra,* 163 Cal.App.4th at p. 356.)

To establish a prima facie case for a section 1102.5 violation, " 'a plaintiff must show (1) [he or] she engaged in a protected activity, (2) [the] employer subjected [him or] her to an adverse employment action, and (3) there is a causal link between the two.' " (*Mokler v.*

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6 Undesignated statutory references are to the Labor Code.

County of Orange (2007) 157 Cal.App.4th 121, 138.) A plaintiff must demonstrate by a preponderance of the evidence that the protected activity was a "contributing factor in the alleged prohibited action against the employee." (§ 1102.6.) Once plaintiff has met this burden, the burden of proof shifts to the employer to "demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5." (*Ibid.*) Section 1102.6 describes the employer's burden of proving a same-decision affirmative defense. (*Harris, supra,* 56 Cal.4th at p. 239.)

Defendant does not dispute that Aspell participated in a protected activity. Nor does defendant contest that Aspell has proven by a preponderance of the evidence that retaliation was a contributing factor in the adverse action. Solely for purposes of analysis, we assume without deciding that Aspell participated in a protected activity and that he has proven by a preponderance of the evidence that retaliation was a contributing factor in his termination. The question becomes whether defendant met its initial burden of showing "by clear and convincing evidence" that it terminated Aspell "for legitimate, independent reasons even if [Aspell] had not engaged in activities protected by Section 1102.5." (§ 1102.6.)

We conclude that defendant's evidence clearly and convincingly shows that it terminated Aspell based on his poor performance. (*Ante*, at pt. III.A.) Accordingly, the burden shifts to Aspell to show the existence of a triable issue of material fact that defendant's legitimate reasons for terminating his employment was a pretext for illegal retaliation. "[A]n employer is entitled to summary judgment if, considering the

employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was [retaliatory]." (*Guz*, *supra*, 24 Cal.4th at p. 361.)

Turning to the evidence, it is undisputed that Microsoft e-mailed the resort, requesting that it conduct a self-audit by January 26. The e-mail stated that "[s]oftware audits are a standard process to verify partners and customers are in compliance with the terms of their license agreements." The self-audit required the resort to compare the number of Microsoft products in use to the number of effective licenses owned by the resort. Aspell requested an extension to conduct the audit, which Microsoft granted.

Aspell testified that his job required him to keep licensing current and that Blevins needed to provide the company funds to do so. In April Aspell submitted a purchase order, but he claims that it never "came back." Aspell e-mailed Blevins on April 7 to inform him that he "researched the Microsoft (and other) licensing liability issue" and that he recommended that the resort "get[] fully compliant" by the renewal date. Blevins responded, telling Aspell that he wanted to think about and discuss it with the resort's general manager, and to "[h]old off on the [purchase order] for now if you want." Aspell testified that he purchased 25 additional licenses for about $20,000 "on [his] own authority" after a week elapsed without a response from Blevins. Aspell stated that the purchase went "directly under [Blevins's] credit card," that Blevins never said anything, no one else said anything and that "[e]verything went on smooth[ly]."

Belvins's testimony on this subject is similar to Aspell's. Blevins testified that Aspell notified him "of something that was typical of a person in [Aspell's] position as

the IT manager and a department head. He was providing me a notice, apparently, that had been received by him regarding an audit." Blevins stated that:

> "A. . . . [The audit] was nothing that was extraordinary in my mind. There was nothing alarming about the audit. And it was nothing that I didn't feel [Aspell] could handle himself.
>
> "Q. Did you let Len handle it himself?
>
> "A. Yes, I would have—yes, I did. It would have been expected of him in his position.
>
> "Q. Did Mr. Aspell have full authority and discretion to handle that by himself? [¶] . . .
>
> "THE WITNESS: I would say that Mr. Aspell had full authority to complete the audit and the assessment; and quite honestly, it was expected of him in his role as the IT manager to do so, and inform me of the results."

Blevins stated that Aspell did not have full authority to make expenditures and after informing Aspell that he would discuss the matter with the general manager, he "probably" told Aspell to submit the purchase order the following day and that Aspell did so. Aspell's counsel then asked:

> "Q. I'll represent to you that plaintiff has testified in this action that you never got back to him regarding that email. And my only question is, do you dispute that?
>
> "A. I do dispute it. I provided a copy of the purchase order that Mr. Aspell submitted to me for approval. Within one business day, I approved the purchase order . . . , therefore giving him the permission to go ahead and proceed with purchasing the license[s] that we needed to be in compliance."

The only disagreement between Aspell and Blevins regarding the licensing issue is whether Blevins responded to Aspell's requested purchase order. Blevins claims that he

responded and approved the purchase. Aspell claims that Blevins did not respond to the purchase order request, that he purchased the required licenses, and nothing was ever said about it. Given Aspell's documented performance issues before April, the dispute over whether Blevins responded or failed to respond to Aspell's purchase order request is insufficient to permit a rational inference that defendant's actual motive for terminating Aspell's employment was retaliatory based on his act of informing Blevins about the licensing audit and the legal ramifications for ignoring the audit. Apsell's reliance on the temporal proximity of the licensing issue (April) and his termination (September), while sufficient to satisfy his initial burden of creating a prima facie case, is insufficient to create a triable issue as to pretext. (*Loggins, supra*, 151 Cal.App.4th at p. 1112 [temporal proximity "does not, without more, suffice . . . to show a triable issue of fact on whether the employer's articulated reason was untrue and pretextual"].) On this record, the trial court correctly summarily adjudicated Aspell's wrongful termination cause of action.

C. *Aspell's Remaining Claims*

Aspell's second cause of action alleges that defendant failed to prevent discrimination. Defendant is entitled to judgment on this claim because Aspell has not shown that the predicate conduct—discrimination—actually occurred. (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 597 ["Plaintiffs' failure to provide the necessary evidence to support their discrimination claim necessarily dooms their failure to prevent discrimination claim."].)

Aspell also alleged that defendant's Labor Code violations constituted an business practice that also violated Business and Professions Code section 17200. Because Aspell has

not shown any Labor Code violations, the parties agree that this derivation cause of action fails. (*Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147.)

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.